Supreme Court, U.S.
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No. 01-535

IN THE

Supreme Court of the United States

CAREMARK RX, INC. and MEDPARTNERS ACQUISITION CORPORATION,

Petitioners

v.

BRANDON, JONES, SANDALL, ZEIDE, KOHN, CHALAL & MUSSO, P.A., *et al.*,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

JOSEPH W. LETZER
F. A. FLOWERS, III*
ERIC D. FRANZ
BURR & FORMAN LLP
3100 SouthTrust Tower
420 North 20th Street
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Petitioners

**Counsel of Record*

STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statements were set forth at page ii of their Petition for a Writ of Certiorari, and there are no amendments to those Statements.

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ARGUMENT IN REPLY

I. Respondents' Own Brief In Opposition Highlights The Conflict Among The Courts That Have Addressed The Question Presented By This Case.

Respondents have conceded repeatedly that the court below exercised jurisdiction to review the district court's "denial" of respondents' motions, despite the undeniable fact that "[n]o action by the Northern District of Alabama was ever taken" on those motions. (Brief in Opp. 3; *see also id.* at 5, 6, 7, 12). Courts from other jurisdictions have uniformly held that appellate jurisdiction will lie in the absence of an order or ruling by a federal district court *only* when exceptional circumstances exist that pose a threat of irreparable harm to the appellant and the case would be unreviewable at a later date. (*See* Pet. 8-14 & n.3). In contrast to these other courts, the Eleventh Circuit abandoned these requirements and gave no reasons whatsoever for exercising appellate jurisdiction. (*See* Pet. App. 1a-2a).

In an attempt to persuade the Court that the Eleventh Circuit's exercise of jurisdiction was consistent with prior precedent, respondents point to several cases in which other courts have recognized a right to appellate review "in certain rare cases in which the district court in fact issued no order at all." (Brief in Opp. 12-13) (citations omitted). Respondents' argument is totally wide of the mark, however, because *all* of those decisions turned on an express finding of irreparable injury, a finding which is notably absent from the Eleventh Circuit's decision in this case. (*See* Pet. App. 1a-2a).

Relying primarily on the Fifth Circuit's decision in *United States v. Lynd*, 301 F.2d 818 (5th Cir.), *cert. denied*, 371 U.S. 893 (1962), respondents argue that a district court's

delay in granting a preliminary injunction is immediately appealable. (Brief in Opp. 12-13). The Fifth Circuit itself has eschewed such a sweeping expansion of appellate jurisdiction. In *Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984), the Fifth Circuit expressly cautioned that " 'it does not follow [from *Lynd*] that every failure of a trial court to grant a temporary injunction is tantamount to a "refusal" of such injunctive relief.' " 784 F.2d at 952, *quoting NAACP v. Thompson*, 321 F.2d 199, 202 (5th Cir. 1963).[1]

Indeed, the Fifth Circuit in *Overton* stressed the unusual circumstances presented in *Lynd*, including clear indications of bias on the part of the district court and the "vital" need for "immediately effective relief" due to an impending election. *Overton*, 748 F.2d at 952. That is not the situation here. In the Fifth Circuit, therefore, but not in the Eleventh Circuit, *Lynd* is inapplicable when the "court's inaction d[oes]

1. Respondents' reliance on *Lynd* is misplaced for an even more fundamental reason. In *Lynd*, as well as all of the other cases which have relied upon it to support a finding of appellate jurisdiction in the absence of an order or ruling, the courts were faced with a motion seeking preliminary injunctive relief rather than, as here, a motion to dissolve an injunction. *See Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441 (9th Cir. 1992); *Rolo v. General Dev. Corp.*, 949 F.2d 695 (3d Cir. 1991); *Cedar Coal Co. v. United Mine Workers of America*, 560 F.2d 1153 (4th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978).

There is an obvious reason for this difference. Preliminary injunctions are specifically designed to preserve the status quo in the face of an impending change in circumstances. The failure to enter a preliminary injunction might be expected to result in immediate and irreparable harm, justifying expedited appellate review. On the other hand, once an injunction is in place, the injunction, by its very nature, will preserve the relative positions of the parties pending further proceedings. Accordingly, mere delay in ruling on a motion to dissolve an injunction will not pose a threat of irreparable harm that would make the case unreviewable at a later date. This case is no exception.

not deny or render impractical the granting of the relief sought." *Id.* at 951. The decision below is simply irreconcilable with the Fifth Circuit's decision in *Overton*.

The other decisions relied upon by respondents also highlight the Eleventh Circuit's sharp break with the approach taken by the other federal courts of appeals on the issue presented by this case. In *Cedar Coal Co. v. United Mine Workers of America*, *supra*, a coal company sought a preliminary injunction to halt an on-going strike at several of its mines. 560 F.2d at 1157-59. The district court entered a temporary restraining order and initially set a hearing on the company's motion for a preliminary injunction. *Id.* Later, however, the district court continued the hearing on the motion "indefinitely," allowing the previously entered restraining order to expire and the strike to continue. *Id.* at 1161. The company then appealed.

The Fourth Circuit exercised appellate jurisdiction despite the district court's failure to rule on the motion for a preliminary injunction, describing the case before it as "indistinguishable" from *Lynd*. 560 F.2d at 1161. Indeed, *Cedar Coal*, like *Lynd*, involved the sort of imminent harm (the on-going strike) and the concomitant affirmative refusal of the district court to rule on a motion seeking injunctive relief from such imminent harm that sometimes justifies the exceptional exercise of appellate jurisdiction in the absence of an order or ruling by the district court. This case, in contrast, does not involve any such exceptional circumstances. (*See* pages 4-6, *infra*).[2]

2. The remaining decisions upon which respondents rely do not support their position either. In *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507 (11th Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995), the Eleventh Circuit entertained an appeal from the district court's written orders. 14 F.3d at 1511 & 1515. The court expressly recognized, in dicta, that only "rare" and exceptional (Cont'd)

Respondents argued in the court below that the district court's delay in ruling "for a year" was itself sufficient grounds for the exercise of appellate jurisdiction. (*See, e.g.*, Brief in Opp. 7-9). The Eleventh Circuit exercised appellate jurisdiction based on the district court's inaction or delay alone, with no mention or analysis of the irreparable injury requirement. (Pet. App. 1a-2a). The approach and result reached by the court below in this case are in direct conflict with decisions of the Fifth, Sixth and Seventh Circuits and lead to irreconcilable results. *See Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984); *United States v. Michigan*, 134 F.3d 745 (6th Cir. 1998) (per curiam); *Middleby Corp. v. Hussman Corp.*, 962 F.2d 614 (7th Cir. 1992).

II. Respondents Have Not And Will Not Suffer Irreparable Injury.

Recognizing that the decision below is fundamentally flawed because of the lack of a finding of irreparable harm, respondents now suggest that the court below may in fact have found irreparable harm before exercising jurisdiction. (Brief in Opp. 19-20). Respondents' irreparable injury arguments advanced in their Brief in Opposition filed with this Court are based entirely on alleged factual assertions by counsel, unsupported in the record, or on novel legal theories never before raised in this action. They offer no cure for the Eleventh Circuit's exercise of appellate jurisdiction in the absence of an order from the district court *and* the absence of irreparable injury.

(Cont'd)
circumstances like those presented in *Lynd* itself would justify appellate review in the absence of an order from the district court. *Id.* at 1516. In *In re Public Serv. Co. v. Northeast Utilities*, 963 F.2d 469 (1st Cir.), *cert. denied*, 506 U.S. 908 (1992), the court simply held that a bankruptcy reorganization plan, which had already been put into effect, could not be undone, rendering an appeal of the propriety of the plan moot. 963 F.2d at 473-74.

No irreparable injury exists here. Unlike the right to vote in the upcoming election involved in *Lynd*, or the right to halt an unlawful and destructive strike like the one involved in *Cedar Coal*, the Orthopedic Center's right to arbitrate could not be eliminated or mooted by the mere passage of time. Indeed, MedPartners' refusal to pay the Orthopedic Center's physicians bonus compensation (not "back compensation" as asserted by respondents) under the contract because of their drop in performance was the original issue that MedPartners *did* agree to arbitrate and the issue which MedPartners has *always* agreed to arbitrate. (Pet. 3). It is only the claim for anticipatory breach of contract seeking *future* damages in excess of $48 million over the remaining fifteen years of the contract that MedPartners has contested as being outside the scope of the parties' arbitration agreement. (R5-38-6). In any event, if the Orthopedic Center had ultimately prevailed on its motions, the arbitration could then have proceeded regardless of any delay which may have been occasioned by the district court.[3]

Nor is there any merit to respondents' assertion that it would have lost its right to effective appellate review of the arbitration issue if the court below had dismissed the appeal for lack of jurisdiction. The proper remedy for the district court's inaction or delay in ruling on respondents' motions would have been for respondents to file a petition for a writ of mandamus with the Eleventh Circuit, seeking an order from the court of appeals directing the district court to rule.

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3. Contrary to respondents' unsupported assertion, the record clearly establishes that MedPartners, now known as Caremark Rx, Inc., is in excellent financial condition and would be able to satisfy any award or judgment in the Orthopedic Center's favor which could result from the arbitration of *both* of the Orthopedic Center's claims. (*See* Exhibit A to Appellees' Reply to Appellants' Response to Motion to Dismiss in the record below, Oct. 19, 2000 (SEC filing for Caremark Rx, Inc. showing net revenue of more than $1 billion for the year 2000)).

See, e.g., *Madden v. Mayers*, 102 F.3d 74, 78 (3d Cir. 1996); *Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990); *Fernandez-Roque v. Smith*, 671 F.2d 426, 430-31 (11th Cir. 1982); *City of Parma, Ohio v. Levi*, 536 F.2d 133, 135 (6th Cir. 1976).

In addition, if the district court had been allowed to rule on the Orthopedic Center's motions, and had denied them, immediate appellate review would have been available pursuant to 9 U.S.C. § 16(a) and 28 U.S.C. § 1292(a). Review of the arbitration issue was also available via the Orthopedic Center's separate lawsuit pending in the Southern District of Florida. Indeed, the Orthopedic Center had already taken an appeal from that proceeding, which was pending in the Eleventh Circuit at the time respondents filed a Notice of Appeal in this case. The Florida case was reinstated by the Eleventh Circuit and proceeding forward at the time the Eleventh Circuit issued its opinion in this case. (*See* Pet. App. 2a). As respondents themselves point out in their discussion of *United States v. Michigan*, *supra*, the availability of other effective avenues for appellate review preclude any irreparable injury resulting from a district court's inaction or delay. (Brief in Opp. 18).[4]

III. This Case Presents A Live And Ongoing Controversy.

The "final" rulings issued by the Southern District of Florida in the Alabama cases over which the Eleventh Circuit improperly exercised jurisdiction and transferred to Florida do not render this case moot because these so-called "final"

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4. The court's decision in *Reliance Nat'l Ins. Co. v. Seismic Risk Ins. Servs.*, 962 F. Supp. 385 (S.D.N.Y. 1997), upon which respondents rely, has no application here because that case involved a party's request to a federal district court to enjoin a state court proceeding pending arbitration. It obviously has no relevance to the issue of appellate jurisdiction presented here.

rulings occurred after the Eleventh Circuit's unauthorized exercise of appellate jurisdiction. As a result, the rulings upon which respondents base their mootness argument are void. *See, e.g., United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661-62 (1st Cir. 1990) (a plain usurpation of power renders a judgment void); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224-25 (10th Cir. 1979) (same). Petitioners have also recently appealed the two "final" rulings issued by the Southern District of Florida to the Eleventh Circuit.

A case becomes moot when the controversy between the parties is no longer live or when one of the parties lacks a personal stake in the outcome of the lawsuit. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980). These subsequent proceedings demonstrate that there is a "live" controversy between petitioners and respondents and that petitioners undoubtedly have a personal stake in the outcome of this controversy with respondents. Respondents have provided this Court with no legal authority to the contrary.

IV. Respondents' Own Brief In Opposition Demonstrates The Need For The Exercise Of This Court's Supervisory Power.

Respondents have conceded repeatedly in their Brief in Opposition, as mentioned earlier, that the district court did not enter an order or ruling on their motions. (*See* Brief in Opp. 3, 5, 6, 7, 12). Respondents attempt to downplay the significance of this critical omission by arguing that the Eleventh Circuit exercised jurisdiction for the purpose of enabling "the parties to promptly reach an efficient resolution of the issues between them in a single federal court in Florida." (*Id.* at 11-12). The Court should be shocked at respondents' argument.

The Eleventh Circuit's opinion in this case is completely silent about the court's intention or purpose for exercising appellate jurisdiction. (*See* Pet. App. 1a-2a). Concerns for judicial efficiency, moreover, do not confer jurisdiction on the courts of appeals when none has been granted by an Act of Congress. This Court and others have warned against opening the floodgates of interlocutory appeals that would inevitably result by such indiscriminate usurpation of power by the courts of appeals. *See, e.g.*, *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966) (warning against opening the "floodgates" of interlocutory appeals under 28 U.S.C. § 1292(a)(1)); *United States v. Michigan*, 134 F.3d 745, 749 (6th Cir. 1998) ("If the cost, delay and aggravation of litigation made an order appealable, the courts of appeals would be deluged."); *R.R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430, 431 (7th Cir. 1991) (same).

This Court has also declared that a district court's management of a case " 'ought not to be critically examined and re-examined by the cumbersome method of appeal before he has approached the stage of adjudication.' " *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. at 25 n.3, *quoting Peter Pan Fabric, Inc. v. Dixon Textile Corp.*, 280 F.2d 800, 805-06 (2d Cir. 1960) (Clark, J., dissenting). This would be " 'an intolerable burden for [the courts of appeals], an improper and uncertain interference with trial court discretion, a confusing invitation to indiscriminate appeals in the future — all contrary to settled federal law against piecemeal appeals.' " *Id.* Respondents' "efficiency" argument flies in the face of all of these warnings.

The Court should also reject respondents' suggestion that the Eleventh Circuit's usurpation of power and unauthorized expansion of appellate jurisdiction is not an "important" issue for resolution because the court's opinion is unpublished and "contains no discussion of the contents of the record,

the parties' briefs, or oral argument." (Brief in Opp. 11). It is precisely this type of furtive conduct by the court below that cries out for the exercise of this Court's supervisory power. The courts of appeals cannot be permitted to trample upon Article III of the Constitution of the United States and Acts of Congress under the cloak of unpublished opinions. *See generally* Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Decisions Pose a Greater Threat?*, 44 Am. U.L. Rev. 757 (1995).[5]

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5. Of course, it is not uncommon for this Court to grant review and issue full opinions on the merits in cases in which the court below issued an unpublished opinion. *See, e.g., Becker v. Montgomery*, 532 U.S. 757 (2001); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *United States v. Cleveland Indians Baseball Company*, 532 U.S. 200 (2001).

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in the petition, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. In addition, petitioners respectfully request the Court to reverse or vacate the decision below and remand this case with directions to the court below to transfer the two underlying actions back to the United States District Court for the Northern District of Alabama to allow a hearing and ruling on the motions pending at the time of respondents' improvident appeal to the Eleventh Circuit.

Respectfully submitted,

JOSEPH W. LETZER
F. A. FLOWERS, III*
ERIC D. FRANZ
BURR & FORMAN LLP
3100 SouthTrust Tower
420 North 20th Street
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Petitioners

**Counsel of Record*